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Mooney: Foreign Seizures: *Sabbatino* and the Act of State Doctrine

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FOREIGN SEIZURES: *Sabbatino* AND THE ACT OF STATE DOCTRINE. By Eugene F. Mooney.[1] Lexington, Kentucky: University of Kentucky Press. 1967. Pp. 186. $5.00.

It seems unlikely that any lawyer could have escaped the *Sabbatino* case,[2] the action that served as the test case for litigation concerning Cuban expropriations. This case, precipitated by Castro's reaction to reduction of sugar quotas by the United States, involved the disposition of the proceeds of the sale of a sugar cargo, which was expropriated by the Cuban government while it was in Cuban territorial waters.

The controversy first arose in 1960 when the Banco Nacional de Cuba, a financial agent of the Cuban government, brought suit in the District Court for the Southern District of New York seeking a determination that the proceeds belonged to Cuba rather than to the United States nationals whose sugar was the subject of the expropriation. At this level, the American nationals won a motion for summary judgment on the ground that the Cuban taking was illegal as measured against the norms of international law.[3] This disposition was affirmed by the Second Circuit Court of Appeals,[4] but was reversed and remanded by the United States Supreme Court, which felt that the Act of State Doctrine precluded judicial inquiry into the merits of the case.[5]

Congressional reaction was swift. It took the form of the Hickenlooper Amendment attached to the Foreign Assistance Act of 1964, which reversed the *Sabbatino* presumption.[6] The effect of the Hickenlooper Amendment was felt in the decision on remand in the federal district court. After affording the executive branch an opportunity to speak, the court again held that the seizure did indeed violate international law.[7] And once again, the district court has been affirmed by the court of appeals.[8]

Professor Mooney has graced this "decade of the Sabbatino" with a book notable chiefly for its viewpoint, a viewpoint shared by Mr. Justice White, the

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1. Professor of Law, University of Kentucky.

2. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), *rev'g* 193 F. Supp. 375 (1961), *aff'g* 2d Cir., 307 F.2d 845 (1962). The facts are fully stated in the Supreme Court's opinions.

3. 193 F. Supp. 375 (1961).

4. 307 F.2d 845 (1962).

5. 376 U.S. 398 (1964).

6. 22 U.S.C. §2370 (Supp. II 1966). "Under the *Sabbatino* decision, the courts would presume that any adjudication as to the lawfulness under international law of the act of a foreign state would embarrass the conduct of foreign policy unless the President says it would not. Under the amendment, the Court would presume that it may proceed with an adjudication on the merits unless the President states officially that such an adjudication in the particular case would embarrass the conduct of foreign policy." S. Rep. No. 1188, 88th Cong., 2d Sess. 24 (1964).

7. 243 F. Supp. 957, 979 (1965). Specifically the court repeated the language of the court of appeals and held the Cuban expropriation decree "failed to provide adequate compensation . . . involved a retaliatory purpose and a discrimination against United States nationals. . . ."

8. 383 F.2d 166 (1967).

Court's lone dissenter in *Sabbatino,* by Congress, by most members of the practicing bar, and by the internationally oriented American business community. The author tells us that the burden of his book is "to demonstrate that this legalistic [Act of State] doctrine, when pushed beyond its proper purpose, becomes heretical and is utterly without justification in light of the realities of the past practice of our nation" (p. 5). Unfortunately the burden has not been met. His analysis convinces us of neither the one nor the other, no matter how anxious we are to believe. The author's bias shows itself in such assertions: "It is as plain as the positivist nose on the face of the Court's [*Sabbatino*] opinion that the United States Supreme Court doubts both the existence and utility of international law for deciding other than rubberstamp cases" (pp. 94-95).

It is unfortunate that the author's bias is so apparent since the book does make a contribution in its relatively specialized field. This is the first book-length study of foreign seizures to appear as a result of the *Sabbatino* decision, although the decision has given rise to a spate of articles, notes, and comments. As such, it contains invaluable comparative case study and other data essential for putting the problem into context, a task essential to goal clarification and invention of alternative solutions.[9]

Professor Mooney most intrigues us with his hypothesis that *Sabbatino* was the first seizure case to present to the Supreme Court a clear-cut instance of foreign seizures of American owned assets located overseas in clear violation of well-settled international law principles. He explores this hypothesis within the framework of three "stress factors," which had emerged one by one in earlier cases: (1) a "Communist" seizure, (2) by a South American government, (3) in which the State Department manifested disapproval of judicial inquiry into the merits. All three factors are present in *Sabbatino* (p. 72). Such a hypothesis, if valid, is highly significant from the standpoint of predicting the outcome in future similar cases. Unfortunately the Supreme Court avoided the crucial question whether the Cuban taking violated international legal norms, thus suggesting there is no consensus in this area. This weakness is made less important, however, by a strongly affirmative answer each time the district court and the court of appeals considered the question. In each instance those courts emphasized the retaliatory and discriminatory aspect of the taking. These decisions, particularly those reached subsequent to the Hickenlooper Amendment, suggest that Mooney's hypothesis is valid.

Much less satisfactory is the author's treatment of the Court's syllogistic minor premise in *Sabbatino*: There is no international consensus concerning expropriations. Although Professor Mooney strongly disputes this premise, passage after passage of his own text belies his position (pp. 4, 76, 84, 85). Equally unsatisfactory is his treatment of the relative merits of compensation

9. These latter tasks were undertaken at the Seventh Hammarskjöld Forum, January 11, 1965, under the sponsorship of the Association of the Bar of the City of New York. The reader seriously interested in these problems should read the background papers and proceedings of the forum, published for the Association by Oceana Publications.

through private litigation and through a lump sum settlement arrived at by diplomatic negotiation (p. 132).

Finally, one wishes the author had pursued further the extent to which judicial nonreview of the validity of foreign seizures is a matter of constitutional law. Is the Hickenlooper Amendment so worded as to make it binding on the lower federal courts as an exercise of Congress's article III powers, even though it may not be binding on the Supreme Court (p. 124)? Is fear of embarrassing the diplomatic branch in conducting foreign affairs an adequate reason for judicial abnegation (p. 118)? May such abnegation result in the taking of property without due process? What uncertainties regarding the proper relationship between state policies and the national foreign relations power are raised by *Sabbatino*?

Some of these questions are posed by Professor Mooney; some are not. But his contribution is genuine if he provokes the reader to ponder these questions that will lend significance to *Sabbatino* long after the immediate problem of foreign seizures is forgotten.

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